

**BEFORE THE SUPREME COURT CHAMBER  
EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA**

**FILING DETAILS**

**Case No:** 002/19-09-2007-ECCC/SC  
**Filing Party:** Nuon Chea Defence Team  
**Filed To:** Supreme Court Chamber  
**Original Language:** English  
**Date of Document:** 29 July 2015



**CLASSIFICATION**

**Classification Suggested by the Filing Party:** PUBLIC (REDACTED)  
**Classification of the Trial Chamber:** សាធារណៈ/Public  
**Classification Status:**  
**Review of Interim Classification:**  
**Records Officer Name:**  
**Signature:**

---

**NUON CHEA'S REPLY TO CO-PROSECUTORS' RESPONSE TO NUON CHEA'S  
QUESTIONS ON THE SUPREME COURT CHAMBER'S ADDITIONAL  
INVESTIGATION INTO FOOTAGE IN THE POSSESSION OF FILMMAKERS ROB  
LEMKIN AND THET SAMBATH**

---

**Filed By**

**Nuon Chea Defence Team:**  
SON Arun  
Victor KOPPE  
LIV Sovanna  
PRUM Phalla  
Doreen CHEN  
Xiaoyang NIE  
Marina HAKKOU  
Henri DECOEUR

**Distribution**

**Co-Lawyers for Khieu Samphân:**  
KONG Sam Onn  
Anta GUISSÉ  
Arthur VERCKEN

**Co-Prosecutors:**  
CHEA Leang  
Nicholas KOUMJIAN

**Co-Lawyers for the Civil Parties:**  
PICH Ang  
Marie GUIRAUD

## I. INTRODUCTION

1. On 15 June 2015, the Supreme Court Chamber issued an interim decision (the “Decision”) in respect of an additional investigation it had been undertaking, at the request of the Co-Lawyers for Mr. Nuon Chea (the “Defence”), into footage and information in the possession of filmmakers Rob Lemkin and Thet Sambath.<sup>1</sup> During that investigation, the Chamber interviewed Rob Lemkin,<sup>2</sup> who subsequently provided the Chamber with notes he had prepared for a forthcoming article (the “Notes”).<sup>3</sup> Pursuant to the Supreme Court Chamber’s instructions, on 13 July 2015 the Defence filed submissions urging the admission of the Notes into evidence and certain further investigative action (“Application”).<sup>4</sup> On 23 July 2015, the Co-Prosecutors filed a response to these submissions (“Response”).<sup>5</sup> Pursuant to section 8.4 of the Practice Direction on Filing of Documents, the Defence hereby submits the instant Reply.<sup>6</sup>

## II. ARGUMENT

### A. The Co-Prosecutors Apply the Wrong Standards for the Admission of New Evidence on Appeal

2. The Co-Prosecutors apply the wrong standards to the admission of new evidence on appeal at all stages of the Response: they ignore the *de novo* character of appellate proceedings in a civil law system; they demand far too much of the reliability of the evidence; and they misstate the standard for the admission of new evidence on appeal at the *ad hoc* tribunals.

#### (i) *The SCC’s power to admit new evidence in a civil law proceeding is broad*

3. As the Appeal demonstrates, this Chamber has broad authority to admit new evidence. Rule 104(1) expressly authorizes the Supreme Court Chamber to “examine evidence and call new evidence” to determine the issues on appeal. This broad authority is consistent with proceedings before Cambodian courts and in civil law jurisdictions

<sup>1</sup> F2/4/3/3, ‘Decision Requesting Submissions on the Additional Investigation’, 15 Jun 2015 (“Decision”).

<sup>2</sup> F2/4/3/1, ‘Written Record of Witness Interview – Robert T.F. Lemkin’, 18 May 2015 (“Lemkin WRI”).

<sup>3</sup> F2/4/3/3.1, Annex – Robert Lemkin’s Notes on Ruos Nhim’s Political Agenda, 12 Jun 2015 (“Notes”).

<sup>4</sup> F2/4/3/3/1, ‘Nuon Chea’s Response to Questions on the Supreme Court Chamber’s Additional Investigation into Footage in the Possession of Filmmakers Rob Lemkin and Thet Sambath’, 13 Jul 2015 (“Application”).

<sup>5</sup> F2/4/3/3/3, ‘Co-Prosecutors’ Response to Nuon Chea’s Response to Questions on the Supreme Court Chamber’s Additional Investigation into Footage in the Possession of Filmmakers Rom Lemkin and Thet Sambath’, 23 Jul 2015 (“Response”).

<sup>6</sup> Practice Direction ECCC/01/2007/Rev. 8, *Filing of Documents Before the ECCC*, Art. 8.4.

generally, which clearly contemplate a *de novo* assessment of the evidence on appeal<sup>7</sup> – regardless of the Co-Prosecutors’ repeated, indignant and misguided protestations that the Chamber is somehow obligated to prevent the appeal from “deteriorating into a second trial, unduly prolonging proceedings and/or promoting inefficient litigation”.<sup>8</sup>

4. While this Chamber is accordingly entitled to consider any evidence in these proceedings, the Co-Prosecutors’ request to exclude the Notes is particularly odd. This Chamber has already ruled that Lemkin should be heard and initiated an investigation for that purpose. The Notes are the fruits of that investigation and should be considered admissible subject to the general rules of evidence provided for in Rule 87(3). The requirements of Rule 108(7) – if they are relevant to begin with – were satisfied when the Chamber appointed Delegate Judges to conduct the interview with Lemkin.
5. The Defence notes that the broad mandate to ascertain the truth granted to this Chamber in accordance with Cambodian procedure is imposed equally on the Co-Prosecutors, whose role is to act impartially in the execution of their public functions, not as a party to a strictly adversarial proceeding.<sup>9</sup> The Co-Prosecutors nevertheless continue to conduct themselves as if these proceedings unfold within the common law. The Defence finds it difficult to conceive how the exclusion of Lemkin’s Notes, which are already in the possession of this Chamber, were procured through an investigative act which this Chamber initiated, and are manifestly *prima facie* relevant and reliable, could possibly be consistent with this Tribunal’s duty to ascertain the truth or the Co-Prosecutors’ duty to act impartially. There is no doubt that the “admissibility” of the Notes would not even arise in any civil law jurisdiction in the world – including this one.

**(ii) *The reliability standard is low***

6. The Co-Prosecutors assert that the Notes are inadmissible because they are “unreliable” and have “little to no probative value”. The Co-Prosecutors support this claim by

---

<sup>7</sup> F16, ‘Nuon Chea’s Appeal Against the Trial Judgment in Case 002/01’, 29 Dec 2014 (“Appeal”), paras. 2-14.

<sup>8</sup> F2/4/3/3/3, Response, para. 3; F2/7/1, ‘Co-Prosecutors’ Response to Nuon Chea’s Fifth Request to Consider and Obtain Additional Evidence in Connection With the Appeal Against the Trial Judgment in Case 002/01’, 13 Jul 2015, para. 3; F2/6/2, ‘Co-Prosecutors’ Response to Nuon Chea’s Fourth Request to Consider and Obtain Additional Evidence in Connection With the Appeal Against the Trial Judgment in Case 002/01’, 30 Jun 2015, para. 5.

<sup>9</sup> See French Code de procédure pénale, Art. 31 (“Le ministère public exerce l'action publique et requiert l'application de la loi, dans le respect du principe d'impartialité auquel il est tenu.”)

alleging that the Notes rely primarily on anonymous evidence;<sup>10</sup> that the Notes do not have the probative value of records of interviews taken by Philip Short, Stephen Heder and François Ponchaud;<sup>11</sup> that Lemkin and Sambath have not adequately explained their methodology;<sup>12</sup> that the Notes make reference to [REDACTED] and that Sambath has a personal relationship with Nuon Chea (an entirely baseless assertion).<sup>14</sup> None of these allegations is relevant to the threshold reliability of the evidence.

7. Rule 108(7) states, in relevant part:

Subject to Rule 87(3), the parties may submit a request to the Chamber for additional evidence provided it was unavailable at trial and could have been a decisive factor in reaching the decision at trial.

Rule 108(7) therefore requires only that evidence tendered for admission on appeal satisfy Rule 87(3) – the general provision for the admission of evidence at trial – and additionally “could have been a decisive factor in reaching the decision at trial”. Rule 108(7) makes no special provision for the reliability of the evidence. The reliability threshold for the admission of evidence on appeal is accordingly the same as the standard applicable at trial.

8. As the Appeal demonstrates, the Trial Chamber applied Rule 87(3) to admit thousands of documents without any detailed consideration of the circumstances under which they were created.<sup>15</sup> These documents include hundreds of unauthenticated interviews conducted under unknown circumstances by academics, researchers, journalists and foreign governments whose expertise has never been carefully assessed by any judicial authority at the Tribunal, and entire books replete with *ad hoc* mixtures of opinions and unsubstantiated factual assertions. The notion that Lemkin’s Notes of four interviews he personally attended and of which he has videotaped records fall short of this standard is ridiculous – precisely why the Co-Prosecutors make no effort to substantiate it.

---

<sup>10</sup> F2/4/3/3/3, Response, para. 10.

<sup>11</sup> F2/4/3/3/3, Response, paras. 11-15.

<sup>12</sup> F2/4/3/3/3, Response, para. 16.

<sup>13</sup> F2/4/3/3/3, Response, para. 17.

<sup>14</sup> F2/4/3/3/3, Response, paras. 18-19.

<sup>15</sup> F16, Appeal, paras. 156-158. *See, also*, E185 (and attached annexes); E185/1 (and attached annexes); E185.2 (and attached annexes); E299 (and attached annexes).

**(iii) *The Co-Prosecutors misstate the standard for the admission of new evidence applicable before other international courts***

9. Even if this Chamber were to adopt a common law approach to the standard applicable to the admission of new evidence on appeal, the Co-Prosecutors nevertheless misstate the relevant standard applicable before other common law-oriented international courts. While the Co-Prosecutors repeatedly assert that the Application fails to establish that the Notes “*would* [...] have been a decisive factor in the Judgment”,<sup>16</sup> the case law requires only a showing that the verdict *could* have been affected. This distinction is well-recognized in the jurisprudence. In particular, as the ICTY Appeals Chamber held in *Kupreškić*:

In determining whether the new evidence would probably show that a conviction or sentence was unsafe, the Appeals Chamber, in deciding the many Rule 115 motions in this case, first assessed the rationale of the Trial Chamber and the evidence before the Trial Chamber in making its decision. Then, taking into account the submissions of the parties in their written pleadings, the Appeals Chamber made a judgement as to whether the new evidence could have had an impact on the Trial Chamber’s decision to convict. The application of this principle was expressed in different ways. For example: “if some of the proposed evidence had been presented to the Trial Chamber at trial, and had been accepted, it could have affected some of the Trial Chamber’s findings leading to its decision to convict the appellant”; it “would probably show that the conviction or sentence is unsafe”; “this evidence could have had an effect on the Trial Chamber’s findings at trial”; and “had the Trial Chamber had such evidence before it, it probably would have come to a different result”. Although expressed in these various ways, a realistic evaluation of the standard applied throughout the Rule 115 process shows it to be lower than a strict requirement that the new evidence would have had an impact on the Trial Chamber’s decision and is more akin to a test of whether the new evidence could have had an impact on the Trial Chamber’s decision.

[...]

The Appeals Chamber does, however, take this opportunity to clarify that, in its view, the more appropriate standard for the admission of additional evidence under Rule 115 on appeal is whether that evidence “could” have had an impact on the verdict, rather than whether it “would probably” have done so.<sup>17</sup>

Requests for additional evidence are accordingly rejected where “the evidence could not have made any difference to the outcome”.<sup>18</sup>

<sup>16</sup> F2/4/3/3/3, Response, paras. 21, 29.

<sup>17</sup> *Prosecutor v. Kupreškić*, ‘Appeal Judgment’, IT-95-16-A, 23 October 2001 (“*Kupreškić* Appeals Judgment”), paras. 66-68 (emphasis added).

<sup>18</sup> *Kupreškić* Appeals Judgment, para. 66 (emphasis added).

## **B. The Co-Prosecutors Ignore Defence Efforts to Adduce this Evidence at Trial**

10. Although the Notes are admissible pursuant to Rule 108(7) and 104(1) in any event, the Defences notes that it sought an investigation into the material in Lemkin and Sambath's possession at trial.<sup>19</sup> That request was rejected,<sup>20</sup> a decision the Defence has appealed.<sup>21</sup> The Notes are accordingly admissible irrespective of the standards applicable to the admission of new evidence as a remedy for the Trial Chamber's failure to contact Lemkin and the consequent violation of Nuon Chea's right to a present a defence.

## **C. The Notes are Highly Reliable**

11. Contrary to the Co-Prosecutors' claims, the Notes are extremely reliable. The underlying interviews were generated through a collaborative process between Thet Sambath, an experienced journalist who has conducted over a decade of research into Democratic Kampuchea through more than a thousand hours of interviews with a wide range of subjects, and Rob Lemkin, an Oxford-educated filmmaker and journalist with decades of professional experience – including with BBC2 and the BBC World Service<sup>22</sup> – who also happens to be a cousin to Raphael Lemkin and to have been motivated in his work at least in part by his family's personal experience under Nazi Germany.<sup>23</sup> As Lemkin explained to two Judges of this Chamber, he has worked as an independent film producer and documentary filmmaker consistently for the past 30 years, during which time he has made no fewer than 50 television and film documentaries.<sup>24</sup> From 1999 until 2006, he “ran an investigative journalism department at Channel 4 television in the UK.”<sup>25</sup> As the Application demonstrates, Lemkin utilized this considerable expertise to ensure that interviews met the highest standards of journalistic integrity. Interviews were conducted only with subjects able to provide first-hand accounts of the events they were describing.<sup>26</sup> Each subject was interviewed repeatedly, “more than 10 times”, and “efforts were made to triangulate or corroborate

<sup>19</sup> E294, ‘Request to Admit New Evidence, Summons Rob Lemkin and Initiate an Investigation’, 11 Jul 2013.

<sup>20</sup> E294/1, ‘Decision on Nuon Chea Request to Admit New Documents, to Initiate an Investigation and to Summons Mr. Rob Lemkin’, 24 Jul 2013.

<sup>21</sup> F16, Appeal, paras. 83, 730(b).

<sup>22</sup> F2/4/3/1, ‘Written Record of Interview – Robert T. F. Lemkin’, 18 May 2015 (“Lemkin WRI”), ERN 01097180.

<sup>23</sup> See, e.g., Naomi Pfefferman, ‘The Second Lemkin’s Genocide Story Frames the ‘Enemies’’, *Jewish Journal*, 13 Jan 2011.

<sup>24</sup> F2/4/3/1, Lemkin WRI, ERN 01097180.

<sup>25</sup> F2/4/3/1, Lemkin WRI, ERN 01097180.

<sup>26</sup> F2/4/3/1, Lemkin WRI, ERN 01097183.

the information by asking other people about information that one person had given.”<sup>27</sup> Interviews were conducted in “many different locations and different times”.<sup>28</sup> Video recordings of some subjects were shown to other subjects to gauge their reaction.<sup>29</sup>

12. The Notes merely constitute Lemkin’s description of these same interviews. Lemkin described to the Judges of this Chamber his intimate involvement in the process of selecting witnesses, drafting questions, writing the script and editing the footage.<sup>30</sup> All of the interviews were conducted as part of a process to produce a film which Lemkin still hopes will come to fruition.<sup>31</sup> Lemkin accordingly has a “comprehensive familiarity” with the footage to which no one else – including Sambath – can lay claim.<sup>32</sup>
13. Notwithstanding their submissions in the Response, the Co-Prosecutors have repeatedly confirmed the reliability of not only the four underlying interviews mentioned in the Notes but *all* underlying interviews referred to in the film. They have sought their admission into evidence<sup>33</sup> and relied on them continuously both at trial<sup>34</sup> and on appeal.<sup>35</sup> The Defence is not aware of any material concerning Democratic Kampuchea produced by either Thet Sambath or Rob Lemkin which the Co-Prosecutors have not sought urgently to have admitted into evidence in these proceedings. Most bluntly, the Co-Prosecutors declared in a filing before this Chamber last September that “[t]he investigative skills of Thet Sambath cannot be questioned.”<sup>36</sup>
14. Perhaps most puzzling about this Response is accordingly the Co-Prosecutors’ claim that the methodology for taking interviews they themselves have relied on so

<sup>27</sup> F2/4/3/3/1, Application, para. 7.

<sup>28</sup> F2/4/3/1, Lemkin WRI, ERN 01097185.

<sup>29</sup> F2/4/3/1, Lemkin WRI, ERN 01097186.

<sup>30</sup> F2/4/3/1, Lemkin WRI, ERN 01097183-85.

<sup>31</sup> F2/4/3/1, Lemkin WRI, ERN 01097181.

<sup>32</sup> F2/4/3/1, Lemkin WRI, ERN 01097185.

<sup>33</sup> E93/7, ‘Co-Prosecutors’ Request to Hear a Further 2 Experts and 13 Witnesses in the First Phase of the Trial and Notice of Intention to put 7 Video-Clips Relating to Nuon Chea Before the Trial Chamber Pursuant to Rule 87(4)’, 5 Jul 2011, ERN (EN) 00711780, paras 33-34; in respect of *One Day at Po Chrey*, see, E186, ‘Co-Prosecutors’ Disclosure of Documentary Film Entitled “Enemies of the People”, 17 Apr 2012; see, also, E152.

<sup>34</sup> E295/6/1, ‘Co-Prosecutors Final Trial Brief in Case 002/01’, 27 Sep 2013, paras 120, 312, 445, 446, 455, 465, 467, 468, 469, 501,504. References to work by Rob Lemkin and Thet Sambath in the Co-Prosecutors closing trial brief, including *Enemies of the People*, *One Day at Po Chrey*, and *Behind the Killing Fields*, are too numerous to list comprehensively. See also, T. 25 Jun 2013 (OCP Document Presentation, E1/212.2), pp. 34-35; T. 27 Jun 2013 (OCP Document Presentation, E1/214.1), pp. 19-23, 45, 47-53, 59.

<sup>35</sup> F17/1, ‘Co-Prosecutors’ Response to Case 002/01 Appeals’, 24 April 2015, fns. 1417, 1726, 2166, 2363, 2380, 2394.

<sup>36</sup> F2/2, ‘Co-Prosecutors’ Response to Nuon Chea Defence First and Second Requests to obtain and consider additional evidence in connection with the Appeal against the Trial Judgement in Case 002/01’, 16 Sep 2014 (“OCP Response to First and Second Requests”), para. 10.

extensively was unreliable. The Co-Prosecutors seek to guard themselves against this obvious contradiction by distinguishing between Lemkin on the one hand and Thet Sambath on the other. Aside from the manifest absurdity of their mischaracterization of Lemkin's considerable expertise,<sup>37</sup> the Co-Prosecutors perhaps hope that this Chamber will forget that the interviews were taken as part of exactly the same process which produced *Enemies of the People* and *One Day at Po Chrey*. The Co-Prosecutors object on the ground that Lemkin is not competent to comment on interviews conducted by Sambath<sup>38</sup> and simultaneously complain that Lemkin's interview methodology was unreliable. The Co-Prosecutors should perhaps begin by deciding who they think took the interviews and whether they were competent in doing so.

15. Similarly peculiar is the Co-Prosecutors' claim that the interviews are unreliable because they are a mere mouthpiece for Nuon Chea, and accordingly provide him "a way to testify without having his assertions tested in the meaningful way that cross-examination would have allowed."<sup>39</sup> Again, the Co-Prosecutors' view of Lemkin and Sambath's interview process – including "the decision-making process of whom to interview, what questions or materials to put to the witnesses, and which material to select for their film or book"<sup>40</sup> – is rather different before the Trial Chamber, where they repeatedly seek to admit and rely on excerpts from Sambath's book and both of Lemkin and Sambath's films.<sup>41</sup> The Co-Prosecutors were so desperate to have access to the very interviewees identified via Sambath and Lemkin's "decision-making process" that they admitted in open court that it was essential to hear some of these interviewees as witnesses to ensure that they have a "reasonable opportunity" to prove that the killings at Tuol Po Chrey took place.<sup>42</sup> This was a wise strategic choice, as the individuals interviewed and filmed by Lemkin and Sambath provided the only reliable evidence of killings on the case file.<sup>43</sup> The Supreme Court Chamber can rest assured that it was not for purpose of leading exculpatory evidence that these requests to hear evidence were made.

---

<sup>37</sup> See para. 11, *supra*.

<sup>38</sup> F2/2, OCP Response to First and Second Requests, para. 16.

<sup>39</sup> 2/4/3/3/3, Response, para. 19.

<sup>40</sup> 2/4/3/3/3, Response, para. 18.

<sup>41</sup> See para. 13, *supra*.

<sup>42</sup> T. 13 Jun 2013 (Trial Management Meeting, E1/207.1), p. 71.

<sup>43</sup> F16, Appeal, paras. 449-450.



16. The Co-Prosecutors compound the irrationality of these arguments in their efforts to distinguish Lemkin's expertise from Philip Short, François Ponchaud and Stephen Heder's. The premise of this argument is first of all (and once again) incorrect: the interviews were taken by Sambath and Lemkin acting together and accordingly it is their joint expertise which constitutes the proper basis for comparison. Yet, even operating from this false premise, the Notes are manifestly more reliable than any of the interviews taken by Ponchaud, Short or Heder.
17. The Co-Prosecutors' analysis of the interviews collected by Ponchaud, Short and Heder and relied upon consistently throughout the Judgment as key evidence in support of highly disputed questions of fact is seriously misguided. The discussion focuses almost entirely on each witness's supposed expertise about Cambodia and Democratic Kampuchea, and continues the Co-Prosecutors' determined efforts to discredit by any means necessary a witness whose work they have relied on extensively in Case 002 and continue to cite before the Trial Chamber. Yet, the Defence does not seek to admit Lemkin's opinion into evidence or to call Lemkin as an expert witness, and still less to establish that he would be a better qualified expert than Short, Ponchaud or Heder. The Defence seeks to admit into evidence Lemkin's first-hand account of the interviews he initiated, planned, attended and thoroughly reviewed. The issue for this Chamber is not whether Stephen Heder is more knowledgeable than Rob Lemkin about Democratic Kampuchea, but who has provided more reliable accounts of the interviews to which they were privy.
18. The considerable indicia of reliability in this regard have already been described.<sup>44</sup> Lemkin's professional expertise in interviewing witnesses is considerably greater than Ponchaud's and possibly Heder's. Unlike Philip Short, the source of Lemkin's translations – Thet Sambath – is known and reliable. Unlike any witness to appear before the Trial Chamber, Lemkin has videotaped accounts of every single interview on which he relies. His interviews were conducted within the last ten years, more recently than Ponchaud, Short or Heder. There is therefore no doubt that the Notes are the product of Lemkin's considered, thorough and repeated review of interviews which he considers the centrepiece of a decade-long research project. The Co-Prosecutors would have this Chamber hold that this document is less reliable than the notes Stephen Heder

---

<sup>44</sup> See paras. 11-12, *supra*.

jotted down as a graduate student in his twenties thirty-six years ago, while speaking in his third language to strangers in a refugee camp at the Thai border.<sup>45</sup>

19. The Co-Prosecutors switch tactics from illogical to patently false in claiming that “Short, Ponchaud and Heder provided the Trial Chamber with the identity of their key sources on matters to which they testified”.<sup>46</sup> In reality, all three witnesses gave considerable testimony based on anonymous interviews on which the Trial Chamber relied extensively.<sup>47</sup> Ponchaud testified at trial that he obscured the identities of most of the sources in his interviews on the case file.<sup>48</sup> When asked for more detail about the identity of an interviewee described in his notes as merely “man from tambon 13”, Stephen Heder stated, “I’ve got a vague recollection of the guy’s appearance but I couldn’t tell you anymore.”<sup>49</sup> The Trial Chamber relied on these anonymous interviews, among many others, constantly in the Judgment.<sup>50</sup>
20. But it is the Trial Chamber’s treatment of Philip Short’s evidence which definitively proves its total indifference to the sources of hearsay evidence given at trial. As the Appeal demonstrates, the Trial Chamber relied on Short’s conversations with unnamed “villagers” as the sole evidence that Khmer Republic soldiers were executed in Oudong in 1974. Yet, not only was Short unable to “describe, identify or even remember these conversations except by reference to the endnote in his book”, his actual testimony about what these “villagers” told him was, “At this, you know, 12 years afterwards, I'm afraid I can't be very helpful.”<sup>51</sup> It is literally impossible that the Trial Chamber sought to assess the reliability of the conversations in which these mysterious “villagers” supposedly told Short about the executions of Khmer Republic soldiers because Short never testified that any such conversations took place. The fact that the Trial Chamber recognized in paragraph 34 of their nearly 700-page judgment that international standards require the exercise of minimum levels of caution in the assessment of the

---

<sup>45</sup> E3/1714, ‘Interviews with Kampuchean Refugees at Thai-Cambodia Border’, February – March 1980, (“Notes”) ERN 00170692 (noting the year of the document – 1980 – and describing Heder as a “Graduate Student” at Cornell University). *See, also*, T. 10 Jul 2013 (Stephen Heder, E1/221.1), pp. 26-28 (Heder generally conducted interviews in Khmer, recording answers simultaneously in English; Heder was not yet fluent in Khmer when he began interviews at the Thai border in 1978).

<sup>46</sup> F2/4/3/3/3, Response, para. 11.

<sup>47</sup> *See generally*, F16, Appeal, para. 164 & fn. 423.

<sup>48</sup> T. 10 Apr 2013 (François Ponchaud, E1/179.1), p. 96; E3/4590, ‘Refugee Accounts’ (‘Ponchaud Refugee Interviews’), ERN 00820319-2.

<sup>49</sup> T. 10 Jul 2013 (Stephen Heder, E1/221.1), p. 107.

<sup>50</sup> *See* F16, Appeal, paras 164, 170.

<sup>51</sup> F16, Appeal, paras 170, 532.

evidence does not absolve it of its manifest failure to apply those standards in its findings throughout the rest of the Judgment.

21. The Co-Prosecutors continue this pattern of deception with their totally unsubstantiated claim that Lemkin and Sambath “first show[ed...] interviewees [REDACTED] [REDACTED]. The Notes nowhere state that Lemkin showed interviewees [REDACTED] [REDACTED] *before* the interviews took place. This is instead a practice reserved for the Co-Investigating Judges, who, to take just one example, prompted witness Meas Voeun with a leading question based on information from Chou Chet’s confession in an attempt to elicit his confirmation that Nuon Chea was present at a West Zone Congress in 1977.<sup>53</sup> By contrast, it was entirely reasonable for Lemkin and Sambath to show interviewees [REDACTED] [REDACTED]. It is in any case fantastical to suggest that these witnesses fabricated from whole cloth detailed accounts of specific events they personally witnessed on demand after skimming [REDACTED] [REDACTED] merely because those events are broadly consistent with certain statements [REDACTED]. It is also peculiar, to say the least, that the Co-Prosecutors take pains to stress in their Response that the witnesses’ “motivations for speaking to the filmmakers are unknown” – a concern that did not appear to trouble the Co-Prosecutors with regard to the thousands of individuals whose evidence has already been admitted in this case.

**D. The Notes Could Have Been a Decisive Factor at Trial**

22. As the Application establishes in detail, Lemkin’s Notes provide multiple first-hand accounts of key facts from well-placed witnesses which directly contradict the Trial Chamber’s most important findings concerning the structure of the CPK. The Notes establish that [REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]

<sup>52</sup> F2/4/3/3/3, Response, para. 17.

<sup>53</sup> E3/80, ‘Written Record of Interview – MEAS Voeun’, 3 Mar 2010, ERN 00491657.

<sup>54</sup> F2/4/3/3/1, Application, para. 6.

<sup>55</sup> F2/4/3/3/1, Application, para. 6.

[REDACTED]

[REDACTED] These facts constitute a dramatic departure from the carefully crafted image of the Party in the Judgment as a strictly “hierarchical”, “pyramidal” entity in which cadres throughout the entire country and over the course of the regime consistently acted pursuant to Party policy as formulated by Pol Pot and Nuon Chea.<sup>58</sup> As the Appeal demonstrates, the evidence cited by the Trial Chamber in support of these extremely broad conclusions was vanishingly thin.<sup>59</sup>

23. As both the Application and the Appeal further demonstrate, the Trial Chamber’s errors in this regard were essential to its findings on criminal liability. The Trial Chamber relied repeatedly on the supposedly strict nature of the reporting relationship within the CPK as key components – possibly determinative – of Nuon Chea’s liability for every conviction entered in the Judgment.<sup>60</sup> The Co-Prosecutors – who insist that these errors could not have affected the verdict – apparently believe that the Trial Chamber’s repeated reference to its analysis of CPK structure throughout its assessment of Nuon Chea’s individual criminal responsibility served no significant analytic purpose.
24. The Co-Prosecutors say little about the substance of this critical, exculpatory evidence. Their primary argument is that a decision to overthrow Pol Pot adopted by top Northwest and East Zone cadres [REDACTED] is not “relevant” because it took place in May 1975 instead of April 1975.<sup>61</sup> Yet, the temporal jurisdiction of Case 002/01 extends well into 1977 and Nuon Chea was held liable for crimes allegedly committed through the course of the Phase II population movement, primarily by troops in precisely these two zones. Moreover, the Trial Chamber made extensive findings concerning the CPK’s alleged policy to target Khmer Republic soldiers and officials “throughout the DK era”.<sup>62</sup> The vast majority of the supposed evidence of Party Center instructions in that regard is dated June 1975 or later,<sup>63</sup> while the Trial Chamber relied heavily on supposed evidence of targeting in “late 1975, 1976

---

<sup>56</sup> F2/4/3/3/1, Application, para. 6.

<sup>57</sup> F2/4/3/3/1, Application, para. 6.

<sup>58</sup> See, e.g., E313, “Case 002/01 Judgment”, 7 Aug 2014 (“Judgment”), paras 223, 859-860. See also, Appeal, paras. 225-249.

<sup>59</sup> F16, Appeal, paras 225-249.

<sup>60</sup> F16, Appeal, para. 226.

<sup>61</sup> F2/4/3/3/3, Response, paras. 27-28.

<sup>62</sup> E313, Judgment, para. 815.

<sup>63</sup> E313, Judgment, para. 817.

and thereafter”<sup>64</sup> and also relied on evidence dated much later than that, including evidence from 1978<sup>65</sup> and as late as January 1979.<sup>66</sup> The Co-Prosecutors argue in their response to the Appeal that our detailed submissions concerning the evidence of Party Center instructions throughout *all of* 1975 are misguided because “the Chamber’s actual finding was based on a review of the evidence as a whole.”<sup>67</sup> The notion that Lemkin’s compelling, first-hand evidence that [REDACTED] [REDACTED] [REDACTED] could not have had an effect on the Judgment because it took place in May instead of April suspends disbelief.

25. Instead of addressing the substance of the evidence, the Co-Prosecutors devote most of their Response to an effort to discredit Lemkin’s Notes by postulating the existence of a series of supposed inaccuracies which simply do not exist. The Co-Prosecutors first claim that while Lemkin asserts that the Standing Committee [REDACTED] [REDACTED] It is clear that the supposed discrepancy concerns [REDACTED] Yet, the Co-Prosecutors must be equally uninformed, because they also claim that [REDACTED] [REDACTED] Their failure to inform this Chamber that they themselves believe that [REDACTED] while chastising Lemkin for the same conclusion is troubling, to say the least. Their pedantic reading of the Notes furthermore misses Lemkin’s obvious meaning: [REDACTED] [REDACTED] [REDACTED]
26. The Co-Prosecutors similarly complain that the Notes are unreliable because Lemkin states that the Central Committee [REDACTED] while the Trial Chamber found that its membership never exceeded 30 people.<sup>71</sup> Yet the only reliable witness cited by the Trial Chamber – Khieu Samphan – actually testified that “the Central

<sup>64</sup> E313, Judgment, para. 833.

<sup>65</sup> See, e.g., E313, Judgment, fn. 1038.

<sup>66</sup> See, e.g., E313, Judgment, fn. 910.

<sup>67</sup> F17/1, ‘Co-Prosecutors’ Response to Case 002/01 Appeals’, 24 Apr 2015, para. 366.

<sup>68</sup> F2/4/3/3/3, Response, para. 24.

<sup>69</sup> See F2/4/3/3/3, Response, para. 24, fn. 63.

<sup>70</sup> T. 30 October 2013 (OCP Response, E1/236.1), p. 118.

<sup>71</sup> F2/4/3/3/3, Response, para. 25; E313, Judgment, para. 202.

Committee consisted of more than 30 members”.<sup>72</sup> It is therefore not Rob Lemkin but the judges of the Trial Chamber who are misinformed. Furthermore, as Lemkin’s discussion of [REDACTED] the Standing Committee demonstrates, [REDACTED]  
[REDACTED]  
[REDACTED] a claim perfectly consistent with the Trial Chamber’s finding that the “identity and number of members changed repeatedly between 1960 and 1979”.<sup>73</sup>

27. The Co-Prosecutors further argue that Lemkin’s analysis is unreliable because he appears to place “great credence” in the claim that [REDACTED]  
[REDACTED]. The Co-Prosecutors insinuate that Lemkin’s view in this regard probably came from Nuon Chea himself, whom they suggest Lemkin is merely parroting.<sup>75</sup> Contrary to the Co-Prosecutors’ claim, Lemkin’s analysis is reasoned, balanced and fails to demonstrate his “credence” in anything. Lemkin merely recounts the first-hand account of a witness – [REDACTED]  
[REDACTED]. Lemkin forthrightly describes Nuon Chea’s opinion in this regard, belying the Co-Prosecutors’ apparent suggestion that he has done nothing more than repeat what Nuon Chea told him. Lemkin furthermore asserts in the exact same sequence that [REDACTED]  
[REDACTED]  
[REDACTED]. Lemkin concludes as follows: [REDACTED]  
[REDACTED]. The Co-Prosecutors’ portrayal of Lemkin as a gullible mouthpiece for Nuon Chea’s protestations of innocence is absurd.

28. More fundamentally, the Co-Prosecutors’ argument appears to be that the interviews must be wrong because they contradict the Co-Prosecutors’ version of events – a

<sup>72</sup> E3/27, ‘Written Record of Interview of Charged Person – Khieu Samphan alias Hem’, 13 Dec 2007, ERN (En) 00156751. Another account relied on by the Trial Chamber, provided by an individual interviewed by Heder at the Thai border, states that there were “around” 30 members and that 60 people attended a particular meeting, demonstrating the fluidity of membership of the Committee. See E3/1714, ERN 00170750.

<sup>73</sup> E313, Judgment, para. 202.

<sup>74</sup> F2/4/3/3/3, Response, para. 23.

<sup>75</sup> F2/4/3/3/3, Response, para. 23.

<sup>76</sup> F2/4/3/3.1, Notes, ERN 01106930.

<sup>77</sup> F2/4/3/3.1, Notes, ERN 01106931.

version of events which they admit is presently in dispute before the Trial Chamber in Case 002/02. They assert that because some witnesses have described [REDACTED] [REDACTED] it necessarily follows that the Party Center [REDACTED]. The Co-Prosecutors are so certain that this syllogism irrevocably follows that the first-hand account of a witness [REDACTED] is not entitled to even the cautious treatment it was accorded by Lemkin in his Notes. The Co-Prosecutors' questionable logic reflects the general tenor of proceedings in Case 002/01 and many of the findings in the Judgment, pursuant to which evidence is deemed unreliable *just because* it is exculpatory.<sup>78</sup> While this might be an effective path to securing convictions, it hardly constitutes sound legal reasoning.

29. Finally, the Co-Prosecutors' argument that Lemkin's account of the interviews is unreliable because the assertion that [REDACTED] [REDACTED] is inconsistent with evidence showing that [REDACTED] [REDACTED]. This is a puzzling complaint: there is nothing at all inconsistent between the fact that [REDACTED] [REDACTED] [REDACTED]. Indeed, the Trial Chamber held that forces which were left under the control of the Zones for the limited "purpose of territorial defence".<sup>80</sup> [REDACTED] [REDACTED] – precisely what Lemkin and Sambath's interviewees confirm.

**E. The Notes do not Materially Depend on S-21 Confessions**

30. The Co-Prosecutors further impugn Lemkin and Sambath's work because the Notes make reference to [REDACTED]. Yet the Co-Prosecutors admit that Lemkin relies on [REDACTED] merely as "corroboration" for the first-hand account provided by one of his interviewees, and indeed Lemkin's reference to [REDACTED] [REDACTED] following his matter-of-fact description of the

<sup>78</sup> See, e.g., F16, Appeal, paras. 221, 546.

<sup>79</sup> F2/4/3/3/3, Response, para. 22.

<sup>80</sup> E313, Judgment, para. 245.

<sup>81</sup> F2/4/3/3/3, Response, paras. 31-33.

content of that interview.<sup>82</sup> This was a limited and entirely reasonable use of relevant and contemporaneous evidence by a researcher working outside the framework of a legal proceeding.

31. Indeed, the use of S-21 confessions to guide research into Democratic Kampuchea is a widespread practice routinely employed by academics and even investigators at this Tribunal. As already noted, the CIJs themselves used confessions in an effort to elicit inculpatory testimony during interviews taken as part of the Case 002 investigation.<sup>83</sup> Many other researchers have relied heavily on S-21 confessions to formulate opinions about Democratic Kampuchea, most notably Stephen Heder, for whom confessions constitute a critical foundation of his entire understanding of the CPK. In a speech delivered in 2001, Heder described his use of S-21 confessions at length. He explained:

[L]ong before one is through the first thousand pages, it becomes obvious to the reader that some things are undoubtedly true. This assessment is based on common sense plausibility and educated intuition. Some things said appear to be undisputably simple and straightforward statements of fact, which may be taken fully at face value. At the other end of the spectrum are statements which can be judged with almost as much certainty as being utterly false and fantastic fabrication. However, most of what is said seems to fall somewhere in between.<sup>84</sup>

The Co-Prosecutors apparently believe that this “belies the reliability and probative value of [Heder’s] entire body of work”<sup>85</sup> – not least, presumably, the Introductory Submissions and the Closing Order.

### III. CONCLUSION AND RELIEF SOUGHT

32. The distortions, evasions and misrepresentations which characterize nearly every paragraph of this Response do little to support the Co-Prosecutors’ arguments. But they speak volumes about the importance of Lemkin’s evidence. The Co-Prosecutors are desperate to keep the Notes out of evidence because they understand well its implications for the findings in the Judgment. While unfortunate that the Co-Prosecutors appear reluctant to carry out their duty to ascertain the truth, it is incumbent on this Chamber to ensure that the Notes are admitted into evidence and given their due regard during appellate proceedings.

---

<sup>82</sup> F2/4/3/3.1, Notes, ERN 01106929.

<sup>83</sup> See para. 21, *supra*.

<sup>84</sup> Stephen Heder, *Khmer Rouge Opposition to Pol Pot: Pro Vietnamese or Pro-Chinese* (2001).

<sup>85</sup> F2/4/3/3/3, Response, para. 30.

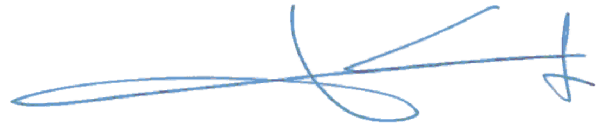


33. The Defence accordingly requests that the Supreme Court Chamber:
- (a) reject the arguments in the Response; and
  - (b) grant the relief sought in the Application.

CO-LAWYERS FOR NUON CHEA



SON Arun



Victor KOPPE